1994

Utah Department of Corrections v. Career Service Review Board : Brief of Appellant

Utah Court of Appeals

Nancy L. Kemp; Attorney General; Jan Graham; Assistant Attorney General; Attorneys for Appellants.
Kathryn Collard; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF CORRECTIONS,	:	
Petitioner,	:	Case No. 940179-CA
v.	:	
CAREER SERVICE REVIEW BOARD and MICHAEL DEAN HUMMEL,	:	Priority No. 14
Respondents.	:	

SUPPLEMENTAL BRIEF OF APPELLANT IN RESPONSE TO
BRIEF OF CAREER SERVICE REVIEW BOARD

- - - - - - - - -

PETITION FOR REVIEW OF DECISION AND FINAL AGENCY ACTION
OF THE CAREER SERVICE REVIEW BOARD

NANCY L. KEMP (5498)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1600
Attorneys for Appellants

KATHRYN COLLARD (0697)
415 Judge Building
8 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 532-1252
Attorney for Appellee
Michael Dean Hummel

STEPHEN G. SCHWENDIMAN (2891)
Assistant Attorney General
JAN GRAHAM (1291)
Utah Attorney General
4120 State Office Building
Salt Lake City, Utah 84114
Telephone: (801) 538-9500
Attorneys for Appellee
Career Service Review Board

ORAL ARGUMENT NOT REQUESTED; PUBLISHED OPINION REQUESTED

IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF CORRECTIONS,	:	
Petitioner,	:	Case No. 940179-CA
v.	:	
CAREER SERVICE REVIEW BOARD and MICHAEL DEAN HUMMEL,	:	Priority No. 14
Respondents.	:	

SUPPLEMENTAL BRIEF OF APPELLANT IN RESPONSE TO BRIEF OF CAREER SERVICE REVIEW BOARD

- - - - - - - -

PETITION FOR REVIEW OF DECISION AND FINAL AGENCY ACTION OF THE CAREER SERVICE REVIEW BOARD

NANCY L. KEMP (5498)
Assistant Attorney General
JAN GRAHAM (1231)
Utah Attorney General
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1600
Attorneys for Appellants

KATHRYN COLLARD (0697)
415 Judge Building
8 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 532-1252
Attorney for Appellee
Michael Dean Hummel

STEPHEN G. SCHWENDIMAN (2891)
Assistant Attorney General
JAN GRAHAM (1291)
Utah Attorney General
4120 State Office Building
Salt Lake City, Utah 84114
Telephone: (801) 538-9500
Attorneys for Appellee
Career Service Review Board

ORAL ARGUMENT NOT REQUESTED; PUBLISHED OPINION REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UTAH DEPARTMENT OF CORRECTIONS,	:	
Petitioner,	:	Case No. 940179-CA
v.	:	
CAREER SERVICE REVIEW BOARD and MICHAEL DEAN HUMMEL,	:	Priority No. 14
Respondents.	:	

SUPPLEMENTAL BRIEF OF APPELLANT IN RESPONSE TO BRIEF OF CAREER SERVICE REVIEW BOARD

- - - - - - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is a petition for review of the Career Service Review Board's decision and final agency action affirming its hearing officer's reversal of an order of termination by the Department of Corrections. This Court has jurisdiction to hear the petition pursuant to Utah Code Ann. § 78-2a-3(2)(a) (Supp. 1995). Relief is appropriate under Utah Code Ann. § 63-46b-16(4)(1993).

ISSUES PRESENTED UPON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. When the Career Service Review Board ("CSRB") has exercised its jurisdiction to review an agency personnel decision, is the Board an appropriate respondent for purposes of judicial review?

Standard of Review: This issue arises from the course of events on appeal and is therefore presented for initial decision by this Court.

2. Does the CSRB's statutory right to hold evidentiary

hearings entitle it to apply a de novo decisional standard, substituting its judgment for the agency's findings of fact?

Standard of Review: Agency interpretations regarding questions of general law are reviewed without deference for correctness. Utah Dep't of Corrections v. Despain, 824 P.2d 439, 443 n.8 (Utah App. 1991).

3. May the CSRB base its review of agency personnel decisions on events that take place only after the agency decision has become final?

Standard of Review: Agency interpretations regarding questions of general law are reviewed without deference for correctness. Id.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the resolution of the issues before the Court is contained in the body of this brief.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

The Department of Corrections ("Department") relies on the statement of the case as set forth in its principal brief.

B. Statement of Relevant Facts

While relying on the facts as set forth in its principal brief, the Department finds it necessary to correct certain misimpressions arising from CSRB's statement of facts. First,

O. Lane McCotter, who recommended grievant's termination, has never occupied the position of Deputy Director of Corrections, as CSRB's counsel asserts (see Brief of CSRB at 4); rather, at the time of the recommendation, he was director of the Department's Division of Institutional Operations, the division in which grievant was employed.

Second, CSRB counsel states that "counsel for Hummel made several attempts to resolve the issue with Corrections to no avail. On virtually the eve of when the matter was set for hearing and after six months of knowledge of the setting aside of the conviction, Corrections attempted to have the matter remanded" (Brief of CSRB at 5). This unwarranted suggestion of undue delay by the Department is contradicted by the facts. The record makes only a single mention of any settlement attempt: in objecting to the motion for remand, grievant's counsel stated that she had "directed a written proposal of settlement to the Agency" in April, 1992 (R. 1687 at ¶ 4)--three months or more after grievant's conviction was set aside on January 2, 1992. The record further reflects that at a prehearing conference held on July 2, 1991, the Department agreed to stipulate to a stay of CSRB proceedings pending the filing and adjudication of a writ of habeas corpus attacking grievant's criminal conviction (R. 1671). The stay was not lifted until June 3, 1992 (R. 1676)--fully six months after the conviction was set aside--and the order lifting the stay was not placed in the state mail system to the Department until the following day, a Thursday (R. 1677). The Department filed its

motion for remand on June 16, 1992 (R. 1680), well in advance of the prehearing conference set for June 24, 1992 (R. 1678), and before a hearing officer was assigned to the case. It would have been inappropriate for the Department to move for remand while the stay was in effect, and the motion was timely filed after the stay was lifted. Following the Board's June 26 denial of the motion for remand and its assignment of a hearing officer to the case (R. 1690), the Department sought reconsideration of the motion on July 2, 1992 (R. 1698-99). The motion for reconsideration was transmitted to the hearing officer by CSRB Administrator Robert N. White on July 9, 1992 (R. 1700-01) and was denied eight days later (R. 1702-03). Not until July 17, 1992--more than a month after the initial motion for remand was filed--did the newly appointed hearing officer invite the parties to schedule a step 5 hearing (R. 1703).

SUMMARY OF ARGUMENT

This is a case about whether the Department of Corrections had adequate reason to terminate the employment of a correctional officer who violated three provisions of the Department's Code of Conduct. As a self-professed "unbiased" reviewer (see Brief of CSRB at 39), the Board exercised its jurisdiction to determine the propriety of the Department's actions on appeal, requiring the Department to defend its position, and ultimately ordering damages and injunctive relief against the Department. On further appeal to this Court, the Department must once again defend its decision in

order to show that the relief ordered by CSRB was erroneously granted. Because the Board performed an entirely adjudicative role, it has no greater interest in this dispute than a court has in the cases it adjudicates. Just as a court is not a proper respondent in appeals from its decisions, the Board--lacking a stake in the outcome--is not a proper respondent here.

The Board's actions are governed by Utah Code Ann. §§ 67-19a-101 through 408 (1993). While these provisions leave no question that the Board may hold evidentiary hearings, they contain no indication that a de novo decisional standard applies. In fact, the deferential "substantial evidence" standard of proof contained in Utah Code Ann. § 67-19a-406(2)(c) (1993) suggests the opposite. With respect to the nature of its evidentiary hearings, the Board fails to distinguish purpose from process. The Department has never challenged the Board's statutory right to use the evidentiary hearing process for a limited purpose: to assure that the Department's reasons for imposing discipline are factually supported and that the discipline imposed is not abusively disproportionate to those reasons. Where the Department's findings, or reasons, enjoy factual support in the evidence adduced before the Board, the Department's choice of sanction must be measured against those findings for internal consistency--not against some other arguable construction of the record. This Court held as much in Despain.

By holding itself out as the ultimate finder of fact, the Board asserts a right to consider the evidence as it exists at the

time of the CSRB hearing rather than at the time of the Department's personnel action--a proposition without cited precedent. To condone the Board's theory would be to require Department clairvoyance. An agency's discretion in personnel matters cannot depend on its ability to foretell future events. If a change in fact is material to the outcome of agency disciplinary action, the agency taking the action should have the first opportunity to consider its impact in light of the agency's particular mission and needs. Nothing less satisfies the discretion given to department heads by Utah Code Ann. § 67-19-18(5) (1993) and by Utah's appellate courts.

ARGUMENT

POINT I

AN AGENCY ACTING SOLELY TO ADJUDICATE A DISPUTE BETWEEN OTHER PARTIES IS NOT AN APPROPRIATE RESPONDENT ON APPEAL.

Review of the orders of administrative agencies is governed by Rule 14 of the Utah Rules of Appellate Procedure. Under subsection (a) of the rule, "[i]n each case, the agency shall be named respondent." In accordance with this provision, the present appeal--a dispute between the Department of Corrections and its former employee--has been recaptioned "Utah Department of Corrections, Appellant, v. Career Service Review Board and Michael Dean Hummel, Respondents." Yet the Board has no stake in this appeal. It is not a party for or against which relief may be granted. Its participation in the dispute has been solely as an adjudicator. Its interest in the outcome is similar to this

Court's interest in review of its opinions by Utah's supreme court: while the result may change the Court's interpretation and application of law, the Court's position is adequately represented by its decisions at an earlier stage in the case.

Rule 15(a) of the Federal Rules of Appellate Procedure, like its Utah analogue, states that "[i]n each case the agency must be named respondent" in an appeal from an agency order. Construing this language, federal courts have declined to apply it to agencies performing purely adjudicative functions. For example, in McCord v. Benefits Review Board, 514 F.2d 198 (D.C. Cir. 1975), the court dealt with a board decision which overturned a denial of compensation under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"). Despite Rule 15(a)'s directive, and despite statutory language requiring the clerk of court to transmit a copy of the petition for review "to the Board, and to the other parties" (33 U.S.C. 921(c) (Supp. II 1972)), the court held that the board was not the intended respondent under the rule. As the court noted,

> [n]ormally, a single private party is contesting the action of an agency, which agency must appear and defend on the merits to insure the proper adversarial clash requisite to a "case or controversy." But Rule 1(b), Fed.R.App.P. [analogous language appears at Utah R. App. P. 1(d)], says that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." Here, there is sufficient adversity between [the parties] to insure proper litigation without participation by the Board. To require the Board to appear as a party would parallel requiring the District Court to appear and defend its decision upon direct appeal. Further, the Supreme Court has held that indispensability of parties is to turn on practical considerations.

McCord, 514 F.2d at 200. The court concluded that "[d]espite the arguable literal applicability of Rule 15(a), Fed.R.App.P., it is clear that a requirement that the Benefits Review Board litigate herein as a party would merely burden the time and resources of that agency." Id.

Other cases and courts have held similarly. The Third Circuit followed the logic of McCord, noting the parallel between the Benefits Review Board's function and that of a reviewing court:

> Certainly those courts had no duty or interest in defending their actions on appeal. There appears to be no reason why the Benefits Review Board should be thought to have such a duty or interest. At best, it is a nominal respondent, and we have no concern that it will disregard a mandate in a case in which it is not so named.

Nacirema Operating Co. v. Benefits Review Bd., 538 F.2d 73, 75 (3d Cir. 1976); accord, Krolick Contracting Corp. v. Benefits Review Bd., 558 F.2d 685, 689 (3d Cir. 1977) ("We find no reason for reconsidering the *Nacirema Operating Co.* holding that the Benefits Review Board, performing adjudicatory functions only, is not a proper respondent."). Likewise, in Shahady v. Atlas Tile & Marble Co., 673 F.2d 479, 484-85 (D.C. Cir. 1982), the District of Columbia Circuit again rejected the Benefits Review Board as a respondent on grounds of its adjudicative role. The court observed that "Rule 15(a) contemplates that the agency respondent defend the agency's (commission, or board) decision because the respondent *represents* the agency. In LHWCA cases, the Benefits Review Board--as a purely adjudicative entity--functions as a district court." The Fifth Circuit, noting two Ninth Circuit dismissals of

the Benefits Review Board as a respondent, also ruled that "[n]either the statutory provisions for review, nor rule 15(a), F.R.A.P., requires the Board to be a party, nor is its presence as a party necessary to effectuation of orders this court may enter." Offshore Food Serv., Inc. v. Benefits Review Bd., 524 F.2d 967, 967 (5th Cir. 1975) (citation omitted). And the First Circuit, while declining to rule on the propriety of the Benefits Review Board as respondent, characterized its naming under Rule 15(a) as "a purely formal exercise." Prolerized New England Co. v. Benefits Review Bd., 637 F.2d 30, 40 (1st Cir. 1980), cert. denied, 452 U.S. 938 (1981).

The Fourth Circuit, having previously rejected the Benefits Review Board as a proper respondent in I.T.O. Corp. of Baltimore v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975), subsequently distinguished review of Benefits Review Board orders in LHWCA cases from review of actions by agencies which directly confer or deny benefits: "Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a *government* benefit and the government agency which seeks to withhold it." I.T.O. Corp. of Baltimore v. Benefits Review Bd., 542 F.2d 903, 907 n.4 (4th Cir. 1976) (en banc), vacated and remanded on other grounds sub nom Adkins v. I.T.O. Corp. of Baltimore, 433 U.S. 904 (1977). The court held that in such cases, "the agency must be named a respondent since *it* is the party against whom relief is sought; the court could not grant an effective remedy without its

presence." Id.

Cases rejecting an adjudicative agency as respondent are not limited to those involving the Benefits Review Board. The Federal Circuit Court, in reviewing cases arising from decisions of the Merit Systems Protection Board--the federal analogue to the Career Service Review Board--has unequivocally ruled that the MSPB is not a proper respondent on appeal in cases it has adjudicated on the merits. In Hagmeyer v. Department of Treasury, 809 F.2d 1581 (Fed. Cir. 1987), a federal employee sought review of the MSPB's denial of attorney fees. Overruling contrary precedent, the court held "that MSPB is not the proper party respondent in appeals to this court in cases in which the appellate jurisdiction of the board under 5 U.S.C. § 7701 (1982) [including employee appeals from any action appealable to the MSPB] was invoked, or was sought to be invoked, by a petitioner to the board." Hagmeyer, 809 F.2d at 1582. The court noted in a subsequent amplification of the above case that "[t]he touchstone enunciated by the court for determining who is to be named respondent is 'the agency responsible for taking the action.'" Hagmeyer v. Dep't of Treasury, 852 F.2d 531, 534 (Fed. Cir. 1988) (citing Hopkins v. Merit Sys. Protection Bd., 725 F.2d 1368, 1372 (Fed. Cir. 1984)).

The MSPB's role in judicial appeals was reconsidered in 1991, following legislative amendment of 5 U.S.C.A. § 7703(a)(2) (Supp. 1991), which governs judicial review of MSPB decisions. Two federal employees appealed from the board's denial of their petitions challenging settlement agreements with the employing

agencies. The Federal Circuit Court found it "abundantly clear that in overruling *Hagmeyer*, Congress intended that the Board shall be the respondent in all appeals involving its jurisdiction or its rulings on procedural questions, but that in appeals involving underlying personnel actions and attorney fees, the employing agencies shall be the respondents." Amin v. Merit Sys. Protection Bd., 951 F.2d 1247, 1251 (Fed. Cir. 1991). Nonetheless, while acknowledging that one of the consolidated appeals raised primarily procedural issues, the court found that although the appellant challenged the actions of the board's administrative law judge, "he is seeking to overturn a decision which effectively disposed of his case on the merits." Id. at 1253. The court held "that in cases where, as in this case, the appeal from the Board's decision presents mixed questions of procedure and the merits of an agency action, the employing agency is the proper respondent." Id. at 1252. This is because "the agency which took the personnel action has the primary interest in upholding its position and has available the material needed to defend its personnel actions in the appeals to this court." Id.

Unlike the federal statutes governing appeals from MSPB decisions, which deny employing agencies the right to initiate appeals from MSPB determinations, the Utah Administrative Procedures Act gives any party aggrieved by final agency action the right to judicial review. Utah Code Ann. § 63-46b-14(1) (1993) states that "[a] party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is

expressly prohibited by statute." Nothing in title 67, chapter 19a of the Utah Code, which governs state employment grievance and appeal procedures, prohibits state employers from seeking judicial review. This procedural distinction, however, does not vitiate the logic on which the Federal Circuit Court relied in the MSPB cases or its applicability to this appeal. Whether appearing as appellant or respondent, the agency responsible for taking the personnel action is still the party adverse to the employee. A ruling on the merits is no less a ruling on the merits because it favors the employee rather than the agency. Regardless of its posture on appeal, the employing agency still has the primary interest in upholding its position and the materials needed to defend it. The alignment of the parties does not convert the Board's adjudicative role to something different. The Board, as a neutral adjudicator, is simply not the appropriate respondent in appeals from its merits decisions.

Addressing an issue of agency standing to obtain judicial review, the Supreme Court of Utah cited favorably the principle enunciated by the Wisconsin Supreme Court:

> "To hold that the Public Service Commission should not only decide between those conflicting interests in its judicial capacity, but also should represent the state in protecting public rights, would make the Commission both judge and advocate at the same time. Such a concept violates our sense of fair play and due process which we believe administrative agencies acting in a quasi-judicial capacity should ever observe."

Utah Dep't of Business Regulation v. Pub. Serv. Comm'n, 614 P.2d 1242, 1253 (Utah 1980) (quoting Muench v. Pub. Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514, 523 (1952)). To permit the CSRB to act as

both judge and advocate in the present appeal is equally violative of the standards of fair play and due process to which the Board must be held.

There is no question that the Department of Corrections is the agency responsible for taking the action on which this case is based. There is likewise no question that the merits of the dispute between grievant and the Department were at issue before the CSRB, or that the Board adjudicated those merits. The Department has the primary interest in upholding its position before this Court. It is the government agency which bears the ultimate responsibility to provide the relief ordered by the Board. The Board's presence is unnecessary on appeal in order for this Court to effect an appropriate remedy. Under precedent and principle, the Board is not an appropriate respondent in this case, and its participation should be limited to the role of an amicus.

POINT II

THE STATUTORY RIGHT TO TAKE EVIDENCE DOES NOT ENTITLE CSRB TO APPLY A DE NOVO DECISIONAL STANDARD IN ITS REVIEW OF AGENCY PERSONNEL ACTIONS.

The Board, in its brief, spends considerable effort establishing its statutory right to hold an evidentiary hearing. It fails to acknowledge that at no time in the course of this litigation has the Department challenged the Board's right to take evidence in proceedings before it. Rather than dealing squarely with the issue of the appropriate standard of decision under its governing statute, the Board assumes that a de novo standard is

irrevocably linked with the right to take evidence. It further presumes that the agency decision to which deference is entitled is only the sanction applied to the contested conduct, not the finding of sanctionable conduct itself. The Board provides no support for this novel proposition, which implies that an agency selects its disciplinary sanctions in a factual vacuum.

The Board's argument begins by reviewing the powers of CSRB's historical analogues. The Board suggests that even its earliest predecessor, the Merit System Council, was the exclusive finder of fact in employee discipline. The very statute cited by the Board contradicts its argument. The language quoted in the CSRB brief unequivocally contemplates factfinding by the employing agency: "'the normal rules of evidence in courts of law shall not apply in hearings before the department [head] or merit system council.'" Brief of CSRB at 9 (quoting Utah Code Ann. § 67-13-14 (1969)) (emphasis altered); see also CSRB Addendum A at 524. That the statute contemplates agency factfinding indicates a measure of discretion vested in departmental employers.

The Merit System Council rules cited by CSRB are similarly unpersuasive. Although they allowed for the presentation of evidence to the council, the evidentiary aspect of the hearing was clearly discretionary: the agency representative "'may introduce witnesses or material evidence in support of the agency's action.'" Brief of CSRB at 10 (quoting Merit Sys. P. art. III, § 2, ¶ 2.b(2)) (emphasis altered); see also CSRB Addendum B at 3. If evidence before the council was not mandated, the council could hardly have

been intended as the sole or ultimate factfinder.

Nothing in these provisions granted the council the factfinding exclusivity promoted by the Board. Moreover, because the council was created and governed by legislation since repealed, there is no necessary identity between its powers and the Board's. Finally, the assertedly representative council opinion appended to CSRB's brief at Addendum C reveals nothing regarding the decisional standard applied by the council. The listed findings could derive as easily from a deferential review of agency findings as from original factfinding by the council. The Board's argument premised on the Merit System Council's powers is simply irrelevant to the issues for decision here.

The Board's reliance on State v. Utah Merit System Council, 614 P.2d 1259 (Utah 1980) (see Brief of CSRB at 11) is similarly misplaced. The case held that the exclusion of the employing agency's director from council proceedings was reversible error. The fact that the court found the director's presence necessary "to assure an accurate and complete disclosure of facts" (614 P.2d at 1262) again indicates nothing about the council's decisional standard. It merely demonstrates that where the council was invoked as an evidentiary forum, it could not deprive the department head her right to be present during the production of evidence.

Like the Merit System Council, the Personnel Review Board ("PRB") operated under statutes now repealed. Those statutes continued the permissive nature of evidence presentation before the

PRB: as quoted by CSRB, "'[t]he aggrieved employee and employer may, in addition to the provisions of [section] 67-19-22, be present at all hearings, produce witnesses, examine and cross examine witnesses, and examine documentary evidence.'" Brief of CSRB at 12 (quoting Utah Code Ann. § 67-19-25(5) (Supp. 1979)) (emphasis altered). The fact that the statute charged the hearing officer to "'render a written decision supported by findings of fact and conclusions of law'" (id.) does no more to establish a decisional standard with respect to those findings than the council provisions previously discussed. In fact, the Board's 1981 rules, contained in Addendum D to the Board's brief, leave the decisional standard to the discretion of the hearing officer: under State Employees' Grievance and App. P. ¶ 20.9 (1981 ed.), "[t]he hearing officer shall determine the quantum of proof." However, under the Board's later rule, on which this Court relied in Utah Department of Corrections v. Sucher, 796 P.2d 721, 722-23 (Utah App. 1990), "[a] hearing officer must 'give latitude and deference to an agency's prior decision when the latter was supported by the findings of fact based on the evidence.' Utah Admin.R. [sic] 665-1-25.4 (1987-88)." This cited rule is notably contrary to the 1981 provision, despite the Board's contention that "the rules cited by this court in Sucher were consistent with the earlier rules." Brief of CSRB at 13.

The Board states that it was created in its present form in 1989 under "Utah Code Ann. § 67-19a-1 [sic] et. [sic] seq." Brief

of CSRB at 13.[1] It claims that "[t]here are several provisions of this act which specifically authorize the Board to hold evidentiary de novo hearings." Id. The Board points to no statute explicitly authorizing it to make original findings of fact without deference to the employing agency, and ignores precedent explicitly to the contrary. In fact, a close reading of title 67, chapter 19a, reveals that the term on which the Board so heavily relies--de novo--appears nowhere in the text of the act.

Regardless of whether an agency employer holds a formal evidentiary hearing before dismissing or demoting its employee or conducts only informal proceedings, Utah Code Ann. section 67-19-18(5) (1993) requires the employer to articulate reasons for applying the selected sanction and to give the employee an opportunity to respond. These reasons, whether the agency arrives at them through a formal or informal process, are the "findings" of the agency to which deference is due if they are supported by substantial evidence--evidence that may, but need not, be adduced in an evidentiary hearing before the Board. Under Utah Code Ann. section 67-19a-403(1) (1993), "[a]t any time after a career service employee submits a grievance to the [Board's] administrator under the authority of Section 67-19a-402, the administrator may attempt to settle the grievance informally by conference, conciliation, and persuasion with the employee and the agency." In other words, the Board need not take evidence to determine whether the agency's

---

[1]Utah Code Ann. §§ 67-19a-101 through 408 (1993), enacted in 1989, govern grievance and appeal procedures. Section 201 creates the Career Service Review Board.

position is substantially justified: it may, in fact, act on the basis of the agency's articulated reasons, or findings.

The Board likens its position to that of a district court reviewing an agency's informal proceedings under section 15 of the Utah Administrative Procedures Act ("UAPA"), Utah Code Ann. §§ 63-46b-1 through 22 (1993). It cites Archer v. Board of State Lands and Forestry, 275 Utah Adv. Rep. 7 (Utah Oct. 11, 1995) as a lodestar, suggesting that since the Department's disciplinary proceedings are "informal at best" under UAPA (Brief of CSRB at 33), the Board's review, like the district court's in Archer, must be de novo. In Archer, the district court exerted its jurisdiction under UAPA's section 15 to review informal proceedings of the Division of State Lands and Forestry concerning the assignment of an easement. Section 15 provides that "[t]he district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings" with certain exceptions not relevant here. Utah Code Ann. § 63-46b-15(1)(a) (Supp. 1995) (emphasis supplied). The critical phrase--"by trial de novo"--is missing from CSRB's governing statutes.

The Board's attempted analogy to Archer is fundamentally flawed. Rather than being classified as an informal proceeding under UAPA--as the agency hearing in Archer was--the Department's personnel action is specifically excluded from UAPA coverage. Utah Code Ann. § 63-46b-1(2) (1993) provides that UAPA "does not govern: (e) applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review

of those actions." This provision not only disqualifies the Department's proceedings from UAPA governance, but precludes the application of direct judicial review under UAPA to the Department's actions. Consequently, even if the Board stood in the position of a district court reviewing informal proceedings, it would lack authority to review the Department's personnel action de novo under UAPA's section 15. The Board apparently wishes to enjoy the powers of a district court without being subject to the restraints on a district court's jurisdiction. Significantly, section 15's unequivocal grant of review by trial de novo in district courts makes clear that when the legislature chose to give de novo powers to a forum reviewing administrative actions, it did so explicitly. The absence of a similar grant in CSRB's controlling statutes militates against a finding of de novo authority.

While accusing the Department of "trying to confuse this court by dealing with semantics as to what the evidentiary hearing is" (Brief of CSRB at 17), the Board engages in semantic deception regarding the decision entitled to deference. In discussing the effect of its decisional standards as reflected in its old and new rules, the Board states, "To infer that the old rule somehow gives deference to the findings of fact is inaccurate and in error." Id. Instead, it appears that the Board's misunderstanding of the Court's clear guidance is inaccurate and erroneous. In Utah Dep't of Corrections v. Despain, the Court reiterated its prior holding in Sucher and the supreme court's holding in In re Discharge of

Jones, 720 P.2d 1356 (Utah 1986), that the role of the Board and its functional analogues is a limited one requiring deference to agency findings and conclusions. Of particular relevance is the Court's comment on the Board's failure to implement a correct decisional standard in its review of Despain's termination:

> Despite this clear direction, the CSRB, in its decision in this case, quoted one of its own previous decisions, stating, with our emphasis: "The Board's hearing officers are to exercise their own discretion as to what evidence or record will be relied upon for their overall decisionmaking at Step 5 . . . . *The degree of deference granted to department's findings and conclusions is discretionary with the Board and its hearing officers . . . .*" The CSRB seems not to have applied the correct standard in reviewing the Department's decision to discharge Despain.

Despain, 824 P.2d at 443, n.6 (underlined emphasis supplied). If this Court had found that the legislature intended the Board's review to be de novo, it could not have concluded that the standard applied by the Board in Despain was incorrect. Despain leaves no doubt that the Department's findings, as well as its conclusions, are entitled to deference on review. The Court categorically rejected the Board's denial of deference to Department findings in Despain, yet the Board has once again implemented a nondeferential decisional standard in the case at bar. Because the Board's decisional standard flouts Despain, it cannot stand.

Under Utah Code Ann. section 67-19a-406(2)(c) (1993), "[t]he party with the burden of proof must prove their [sic] case by substantial evidence." CSRB's governing statutes do not define "substantial evidence." Its rules, however, define "substantial evidence" as "something more than a mere scintilla of evidence but

less than a preponderance. It is relevant evidence such as a reasonable person of an unprejudiced and thinking mind would accept as adequate to support the conclusion drawn from it." Utah Admin. Code R137-1-4. The supreme court, construing the term under UAPA, has held that "'[s]ubstantial evidence' is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." First Nat'l Bank of Boston v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990); accord Utah Ass'n of Counties v. Tax Comm'n, 895 P.2d 819, 821 (Utah 1995); U.S. West Communications, Inc. v. Pub. Serv. Comm'n, 882 P.2d 141, 146 (Utah 1994). In Utah Association of Counties, the supreme court reviewed a decision of the Tax Commission establishing a fair market value for certain property. The court, relying on this Court's decision in Grace Drilling Co. v. Board of Review, 776 P.2d 63, 68 (Utah App. 1989), held that under UAPA's substantial evidence test, "[i]t is not our prerogative on review to reweigh the evidence. Instead, we defer to the Commission's findings because, when reasonably conflicting views arise, it is the Commission's province to draw inferences and resolve these conflicts." Utah Ass'n of Counties, 895 P.2d at 821.

The Board's sole statutory function as a reviewing body is unmistakably clear. Under Utah Code Ann. section 67-19a-202(1) (1993),

> (a) The board shall serve as the final administrative body to review appeals from career service employees and agencies of decisions about promotions, dismissals, demotions, suspensions, written reprimands, wages, salary, violations of personnel rules,

> issues concerning the equitable administration of benefits, reductions in force, and disputes concerning abandonment of position that have not been resolved at an earlier stage in the grievance procedure.
> (b) The Board has no jurisdiction to review or decide any other personnel matters.

(Emphasis supplied.) In unequivocal language, the legislature has made both a positive grant of review authority and a positive denial of original decisionmaking power to the Board. By arrogating to itself greater powers under its review capacity than a reviewing court possesses, the Board usurps the discretion vested in agency employers over their own personnel functions. Just as it is not a reviewing court's prerogative to reweigh evidence, it is not the Board's prerogative to reweigh the evidence underlying the Department's findings. As the initial decisionmaker, the Department, like the Tax Commission in Utah Association of Counties, has the right to draw inferences from the evidence and resolve conflicting views in reaching its findings, to which the Board, on review, must defer if substantial evidence supports them. As this Court has remarked, "The law is clear that the CSRB must give 'latitude and deference' to the Department's personnel actions"--not merely to the sanctions applied. Despain, 824 P.2d at 443.

It is the Board, not the Department, which seeks judicially legislated changes to existing statutes. See Brief of CSRB at 18. What is clearly not provided to the Board by statute is the power of de novo factfinding, and nothing in CSRB's lengthy brief shows the contrary. The Board would have the Court create that right out

of whole cloth. To do so would reverse well-established precedent, rewrite the legislative distribution of agency power, and read Utah Code Ann. section 67-19-18(5)(e) (1993)--under which an "employee may be dismissed or demoted if the department head finds adequate cause or reason" (emphasis supplied)--out of existence. The Department respectfully submits that the Board has articulated no legal or policy basis for such a result.

POINT III

BECAUSE AN AGENCY CANNOT DISCIPLINE AN EMPLOYEE FOR FUTURE EVENTS, THE BOARD MAY NOT USE POST-DISCIPLINE EVENTS TO DISCREDIT THE AGENCY'S FACTUAL BASIS FOR DISCIPLINE.

An agency and its employee do not appear before the Board as untested legal opponents. Rather, they are parties to a dispute that has been once resolved, however formally or informally. As shown above, the Board's limited role is to assure that an agency's reasons for resolving the dispute against the employee were based on evidence sufficient to support the inferences the agency drew from it, and that the sanction imposed is proportional to those inferences. It should be needless to say that an agency cannot draw inferences from information it did not possess at the time of its decision. It is manifest that an agency cannot possess knowledge of events that have not yet come to pass.

Utah Code Ann. section 67-19-18(5)(e) (1993) requires a department head to find "adequate cause or reason" before demoting or dismissing an employee. Common sense dictates that adequate cause or reason must have a basis in evidence, whether or not adduced in a formal hearing, especially where the evidentiary basis

of the decision is subject to scrutiny by the Board, sitting in review. Common sense likewise dictates that the agency cannot have reasoned from non-existent facts; indeed, if it had, the Board would be obligated to find the agency's articulated rationale lacking in evidentiary support. Because some agencies do not make a reviewable record of the evidence on which they rely, the Board is statutorily permitted to require both agency and employee to place their evidence on record before a Board-appointed hearing officer. The Board's evidentiary powers, however, change neither the department head's burden nor the Board's limited scope of review.

The Board "finds it difficult to understand why there is now a contesting of the Board's jurisdiction when Hummel appealed pursuant to statute and statute confers jurisdiction on the CSRB." Brief of CSRB at 37. The Department has never questioned the Board's jurisdiction to review the personnel action; it questions only the scope of that review. A close reading of CSRB's arguments reveals that the flaws inherent in its wrongful appropriation of de novo decisionmaking authority are magnified by the exercise of that unauthorized power in the context of changed facts.

The Board premises its argument on an employee's asserted right "to appeal to the CSRB for a 'new hearing.' See: Utah Code Ann. § 67-19a-401(5)." Brief of CSRB at 31. Section 401(5) reads, in its entirety:

> (5)(a) Unless the employee meets the requirements for excusable neglect established by rule, an employee may submit a grievance for review under this chapter only if the employee submits the grievance:

> (i) within 20 working days after the event giving rise to the grievance; or
>
> (ii) within 20 working days after the employee has knowledge of the event giving rise to the grievance.
>
> (b) Notwithstanding Subsection (4)(a), an employee may not submit a grievance more than one year after the event giving rise to the grievance.

Utah Code Ann. § 67-19a-401(5) (1993) (emphasis supplied). The cited section does not authorize or even mention a "new hearing," as the Board implies; it authorizes only review of a preexisting grievance. The Board's self-serving interpretation is simply not borne out by the words of the statute.

The Board further asserts that

> there is no formal hearing process under the protections of UAPA at Corrections' level as part of the employee grievance process. As such, there is no record to be reviewed per se because UAPA considers such matters "informal." Informal matters have the right to formal adjudications as de novo hearings. While Corrections maintains that its record is sufficient, as a matter of law, it is not.

Brief of CSRB at 32. The Board's analysis is both factually and legally defective. The Board incorrectly asserts that UAPA considers the Department's internal disciplinary proceedings informal. As previously pointed out (supra at 18-19), UAPA does not consider internal agency personnel actions informal; indeed, it does not consider them at all. See Utah Code Ann. § 63-46b-1(2)(e). Because UAPA does not apply to these actions, they are not adjudicated de novo as of right, as CSRB erroneously concludes. De novo adjudication is the standard applied to district courts reviewing UAPA-governed informal proceedings, such as in Archer--not to the Board under its separate statute.

Moreover, CSRB again misstates the Department's position by claiming that the Department maintains its record is sufficient for the Board's review. The Department does not challenge the Board's right to take evidence. It maintains only that if the evidence shows the Department's reasons to have been substantially supported, the Board must accept those reasons as the factual basis for the discipline imposed.

The Board perpetuates its erroneous analysis by relying on In re Noren, 621 P.2d 1247 (Utah 1980). The Noren court faced the issue of whether a license applicant, whose application was administratively rejected on the basis of prior criminal convictions, was entitled to a new determination of the facts in a district court action filed after the convictions were expunged. The court's holding, that the facts were to be determined as of the time the court action was filed, rested on explicit statutory language that treated the filing as "'an *original action* in the district court'." Noren, 621 P.2d at 1248 (quoting Utah Code Ann. §41-3-26). As even the Board acknowledges (see Brief of CSRB at 34), appeals from agency personnel actions are not original actions. For this reason, Noren is not precedent for the Board's conclusion that "[i]n this case, the appeal to the CSRB is the beginning of the UAPA hearing process under the Grievance and Appeals Act" (Brief of CSRB at 35), and the Board offers no other support for its contention. In fact, the Grievance and Appeals Act explicitly contemplates a unified multi-step process beginning with attempted resolution through discussion between the employee and

the supervisor (see Utah Code Ann. § 67-19a-402(1)(a) (1993)) and ending with appeal to the Board (see Utah Code Ann. § 67-19a-407 (1993)).

This Court has taken a more reasoned approach to consideration of information not known to an employing agency. In Tolman v. Salt Lake County Attorney, 818 P.2d 23 (Utah App. 1991), the Court considered a decision of the Salt Lake County Career Services Council ("CSC") upholding the termination of an investigator. The CSC found that the investigator had committed acts inimical to public service in a June 11, 1986, battery. On review, this Court noted

> that the June 11th incident was irrelevant to whether Tolman's dismissal was based upon sufficient cause. If the [County Attorney's Office] did not know about the June 11th incident at the time of Tolman's termination, the June 11th incident could not possibly have been a factor in the decision to dismiss Tolman.

Tolman, 818 P.2d at 25, n.1. Even though the June 11 assault had been committed before Tolman's termination, the Court held it to be irrelevant to the agency's reasons for termination because it was unknown to the agency at the time the termination decision was made. It was therefore found to be unavailable as a post hoc rationalization for the agency's actions. If undisclosed pretermination conduct cannot properly be considered in reviewing the sufficiency of an agency's cause for discipline, surely the Board's reliance on post-termination events is overreaching, unless department heads are endowed with prescience. Moreover, because relevance is a function of relation to issues, not parties, there is no principled distinction to be made on the basis of which party

the irrelevant evidence favors.

Finally, the fact that grievant's conviction was subsequently overturned on grounds unrelated to his admission of the underlying criminal conduct is not, by itself, grounds for reversal of his termination from Department employment. In Peterson v. Utah Board of Pardons, 277 Utah Adv. Rep. 8 (Utah Nov. 3, 1995), the supreme court considered whether a parole revocation must be overturned when the parolee's conviction of the crimes on which the revocation was based is reversed on procedural grounds. Peterson's parole was revoked on the grounds of criminal convictions in September of 1990, less than six months before it would have terminated by law. While incarcerated on the parole violations, Peterson appealed the convictions, which were reversed on April 4, 1991, after the parole period would have run. The Parole Board then issued a new warrant based on the conduct underlying the reversed convictions. Peterson argued that the new warrant was untimely because the initial revocation, based on the convictions, was invalid; he contended that reversal of the convictions had exonerated him of the underlying crimes, and therefore that his parole had run by the time the new warrant was served. Rejecting Peterson's claim of exoneration, the court noted that "[t]he reversal did not undermine or in any way call into question the factual findings of his guilt." Peterson, 277 Utah Adv. Rep. at 11.

Like Peterson's, grievant's conviction was overturned on procedural grounds unrelated to his adjudicated--and, in this case, admitted--conduct. Like Peterson, grievant has not been exonerated

of that conduct. Instead, he was properly found guilty of violating the Department's policies and procedures, as well as state law, by his own admission of physically abusing his minor daughter, an admission from which the court's reversal of his conviction on procedural grounds does not relieve him. If even a constitutionally protected conditional liberty interest can be lost in such circumstances, as in Peterson, then grievant's termination from state employment must surely be sustained in this case.

CONCLUSION

The Career Service Review Board is a creature of the legislature. Its actions are governed by statutes found at title 67, chapter 19a, of the Utah Code, statutes specifically tailored to its peculiar function. Nothing in those statutes provides the Board with the plenary factfinding authority to which it lays claim. By acting beyond the scope of its controlling statutes, the Board continues to circumvent both the law and this Court's interpretation of it.

State employers must deal with realities. Not only do they have discretion under statute and precedent to make personnel decisions in light of agency needs and priorities, but they also must assure that the actions they take are based on the evidence available for their consideration. Their duty runs both to their employees and to the public at large. This balance of interests is not served by second-guessing the agency's reasonable inferences from the information available to it in light of subsequent events.

To suggest otherwise asks the impossible.

The Department's actions in this case were fully justified by the facts that existed at the time of its decision. The evidence before the Board showed as much. The Board's reinterpretation of those facts to justify a different outcome has no warrant in precedent or law. For these reasons, the Department respectfully asks the Court to reverse the decision of the Board and to reinstate the Department's order terminating grievant from employment.

REQUEST REGARDING ORAL ARGUMENT AND PUBLICATION

As this case was fully argued on March 15 of this year, the Department believes further argument is unnecessary, but desires to participate if argument is ordered by the Court. Because employee grievances submitted to the Board will continue to raise the issue of the Board's correct decisional standard, the Department respectfully requests the Court to publish its opinion in this case.

Dated this 14th day of December, 1995.

Nancy L. Kemp
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of December, 1995, I caused to be mailed a true and accurate copy of the foregoing SUPPLEMENTAL BRIEF OF APPELLANT IN RESPONSE TO BRIEF OF CAREER SERVICE REVIEW BOARD to the following:

By placement in the State Mail system:

Stephen G. Schwendiman, Assistant Attorney General
4120 State Office Building
Salt Lake City, Utah 84114

By placement in the U.S. Mail system, postage prepaid:

Kathryn Collard
415 Judge Building
Salt Lake City, Utah 84111

No addendum required in my brief.